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No. 93-1501

In The

Supreme Court of the United States

October Term, 1993

SHARON ANN ZIEGLER,

Petitioner, Pro Se,

v.

THE SUPREME COURT OF DELAWARE, et al.,

and

BOARD OF BAR EXAMINERS OF THE STATE OF DELAWARE, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Delaware

BRIEF OF RESPONDENTS BOARD OF BAR EXAMINERS OF THE STATE OF DELAWARE AND MEMBERS THEREOF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the 1993 Delaware Bar Examination have a rational relationship to Petitioner's fitness or capacity to practice law?

2. Do the Delaware procedures which provide a failing bar applicant with the right to have her examination regraded three times, the right to receive the examination questions, her responses and two representative answers to each essay question, in addition to the opportunity to petition the Board and the Delaware Supreme Court to regrade her examination, satisfy the requirements of procedural due process?

3. Was Petitioner provided with procedural due process when a three-member panel of the Delaware Supreme Court heard her appeal from the Board of Bar Examiners' decision, and the disqualification of one member of the panel had been entered erroneously, where such error was corrected immediately upon its discovery and the decision of the panel was unanimous?

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The Board of Bar Examiners of the State of Delaware and the members thereof (hereinafter "Respondents") respectfully request that this Court deny the petition for a writ of certiorari seeking review of the order of the Delaware Supreme Court in this case. That opinion is appended to the petition for writ of certiorari at appendix a1.

JURISDICTION

This Court does not have jurisdiction to hear Petitioner's claim. Admission to practice law in a state and before its courts is primarily a matter of state concern. *Schware v. Board of Bar Examiners of N.M.*, 353 U.S. 232, 248 (1957) (Frankfurter, J., concurring); *Whitfield v. Illinois Bd. of Law Examiners*, 504 F.2d 474, 477 (7th Cir. 1974). While the Delaware Supreme Court recognizes that "[b]ar examination procedures are always reviewable to determine if there has been any contravention of the Due Process or Equal Protection Clause," *In re Reardon*, 378 A.2d 614, 618 (Del. 1977) (citing *Schware*, 353 U.S. 232 (1957)), Petitioner does not validly raise such a claim here.

Petitioner's argument is that her constitutional rights were violated by the allegedly "arbitrary grading" of the Bar Examination essay questions because the graders were "neither required to adhere to or consistently apply a grading formula, nor . . . required to substantiate the grades they [gave]." (Petition at 13).[1] It is well settled that the mere claim that bar examination essay questions were graded under a subjective standard, without more, raises no federal constitutional claims. *Tyler v. Vickery*, 517 F.2d 1089, 1102 (5th Cir. 1975), *cert. denied*, 426 U.S. 940 (1976) (no federal claim stated in attacking subjective grading of

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[1] Reference to "Petition at ___" refers to specific pages in the Petitioner's Petition for a Writ of Certiorari filed March 18, 1994. Reference to "Appendix at a___" refers to specific pages in the appendix to same. Reference to "Appendix at b___ refers to specific pages to the Appendix attached hereto. Reference to "BR-___" refers to specific rules of the Board of Bar Examiners, found at Vol. 16, Delaware Code Ann. at 771 (Michie, 1987 Replacement Volume).

bar essay examination); *Whitfield*, 504 F.2d at 477 (allegation that bar examination essay questions require "subjective evaluation and that the standards of grading are not susceptible to precise definition . . . is not sufficient to state a claim for federal relief"); *Feldman v. State Bd. of Law Examiners*, 438 F.2d 699, 704 (8th Cir. 1971) (no federal question involved where attack is on honest errors of judgment, negligence or unavoidable mistake inherent in subjective grading of bar examination); *Chaney v. State Bar of Cal.*, 386 F.2d 962, 964-65 (9th Cir 1967), *cert. denied*, 390 U.S. 1011 (1968) *and cert. denied sub nom. Chandler v. United States*, 440 U.S. 927 (1979) (no federal question or "constitutional substance" to claim that bar examination essay questions are based on subjective evaluation by examiner and that discretionary grading ranges makes it impossible to demonstrate that examiner's grade is wrong).

STATEMENT OF THE CASE

A. The Delaware Bar Examination

The Delaware Bar Examination (the "Bar Examination") consists of the Multi-State Bar Examination administered by the National Conference of Bar Examiners and twelve (12) essay questions on subjects which are set forth in the Rules of the Board of Bar Examiners of the State of Delaware. BR-52.4(b). An applicant is deemed to have passed the essay section of the Bar Examination if the applicant achieves an average score of not less than 65% on the twelve questions, providing that the applicant must receive a grade of not less than 65% on more than

five of the questions. BR-52.4(c). In addition, every applicant must pass a separate examination on The Delaware Lawyers' Rules of Professional Conduct (the "Professional Conduct Examination"). BR-52.5. Petitioner passed the Professional Conduct Examination in 1992, but failed the essay portion of the Bar Examination in 1992 and in 1993. *See In re Petition of Sharon Ann Ziegler To Del. Bar*, No. 438, 1993 (Del. Jan. 3, 1994) (ORDER) (Appendix at a1). She contends that the Board of Bar Examiners' (the "Board") procedures for grading the essay section of the Bar Examination are inadequate because the Board does not follow a grading "formula." (Petition at 13). In fact the procedures for the essay portion are detailed and elaborate.

B. The Drafting Process

The process by which the essay portion of the Bar Examination is drafted and graded is as follows: Each essay question and a proposed answer thereto is drafted by one individual member of the Board. Delaware Bar Examiners' Handbook at tab 4. Before submission to the full Board, each draft essay question and answer thereto is reviewed by another member of the Board. *Id.* Both members make up a team which revises the question before submitting it to the full Board for final review and comment. *Id.*

In drafting the essay questions, the Board members follow procedures which are modeled after the *Bar Examiners Handbook* published by the National Conference of Bar Examiners, as well as guidelines set by the Board.

C. Anonymity

The Bar Examination is administered on a strictly anonymous basis. BR-52.6(a). Each examinee picks a number at random, places it in a sealed envelope, which envelope is then deposited in a safe deposit box under the joint control of the Delaware Supreme Court and the secretary to the Board. *Id.* The envelopes are not opened by the secretary until the grades are published. BR-52.6(b)(i). The identity of the failing examinees is not revealed to members of the Board until after the Board has considered and decided all petitions for regrading of the Bar Examination. BR-52.6(b)(iii).

D. Grading

After the Bar Examination, the answer booklets for each question are graded by the Board member who drafted that question, with the assistance of an associate member of the Board (who is also appointed by the Delaware Supreme Court). Essay answers are graded using five point increments. All preliminary results are then submitted to the Secretary of the Board. After the preliminary results are compiled, Board members are asked to review again the answers of each applicant whose average score is between 62% and 64.9% as well as the answers of those applicants who received an average score of at least 65% but who did not achieve a 65% or better on at least seven of the twelve questions in the essay section. A failing applicant is entitled to obtain copies of his or her own answers, as well as representative passing answers, and can petition the Board for

reconsideration of the failing grade. BR-52.6(c) and 52.7. Such reconsideration is performed anonymously.

E. Petitioner's Bar Examination

All of the above procedures were followed with regard to both the 1992 and 1993 Bar Examinations taken by Petitioner. Her petition herein relates only to the 1993 Bar Examination. In the preliminary results submitted by the Board to the Secretary for the 1993 Bar Examination about which she complains Petitioner had achieved an average of 62.5% on the twelve essay questions. *See In re Petition of Sharon Ann Ziegler To Del. Bar*, No. 438, 1993 (Del. Jan. 3, 1994) (ORDER) (Appendix at a1). Following Board procedures, petitioner's answers were reviewed again by the grading board members, and as a result of adjustments made in single point increments to certain individual grades pursuant to that review, Petitioner achieved an average of 63.75%. *Id.* at a2. All applicants to the Delaware bar must receive at least an average score of 65.0% on the essay portion to pass the examination. BR-52.4(c); Appendix at a2. Based on these facts, the Board determined that Petitioner had failed the essay portion of the Bar Examination, and notified her of the results. *Id.*

Petitioner requested and received copies of her essay answers, as well as copies of model answers to those questions. Petitioner then petitioned the Board pursuant to Board of Bar Examiners Rule 52.7, asking that five of her twelve essay answers be reviewed again. (Appendix at b2, ¶ 3). Each member who had primary responsibility for drafting those essay questions once again reviewed

Petitioner's answers, still anonymously. (Appendix at b2, ¶ 4). As a result of the review, one of the five answers received an additional five points, which raised Petitioner's average from 63.75% to 64.17%, still short of the 65.0% average required under the Rules. *Id.* The Board therefore, on November 16, 1993, determined to deny the applicant's petition. *Id.*; *see Ziegler* (Appendix at a2).

Thus, on a strictly anonymous basis, Petitioner's Bar Examination answers were reviewed by the person who had primary responsibility for drafting the questions at least three separate times and adjustments were made to her grades each time. Notwithstanding these efforts of the Board, Petitioner failed the examination.

In Petitioner's Statement of Case, she claims, without support, that the admission process in Delaware is "the most restrictive in the United States." (Petition at 3). However, she complains only about the process by which her essay questions were graded, having had no problem with, and having successfully completed, the rest of the admission process. The fact is that the Delaware admission process is no more restrictive than that of many other states; and clearly has a rational connection to petitioner's fitness or capacity to practice law. In any event, that issue is not relevant to the petition.[2]

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[2] We note an article on bar exainations in the April 15, 1994 New York Times does not list Delaware among the states considered to have the most difficult bar exams. " 'Standards for passing vary tremendously across states' said Steve Klein, . . . an expert in measuring mental abilities at the Rand Corporation in Santa Monica, California. The exams in New York, Massachusetts, Connecticut and the District of Columbia are middling

F. The Appeal

After the Board denied Petitioner's request for reconsideration of her grades, she filed an appeal with the Delaware Supreme Court, as she had also done after failing the Bar Examination in 1992. *See Ziegler* (Appendix at a2). The Board filed its response (*see* Appendix at b1), and Petitioner filed a reply. The Delaware Supreme Court refused the appeal on the ground that Petitioner still had a further opportunity to sit for the Bar Examination and on the grounds that the Board had carefully graded her answers, and after a second and third review raised her average, but that she had nevertheless not achieved the required 65.0% average on her essay examination portion. *Id.* at 1-2. The court also found that Petitioner had shown no fraud, coercion, arbitrariness or manifest unfairness on the part of the Board. *Id.*

Contrary to Petitioner's statement to this Court, the fact that she surreptitiously taped a member of the Board during her character and fitness interview was *not* a ground for the Delaware Supreme Court's refusal of her appeal, although that event was noted with some concern by the Court as possibly reflecting adversely on her character, and that issue was remanded for further consideration by the Board. *See Ziegler* (Appendix at a2-4).

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difficult, he said, while those in Maine, Arkansas, Oregon and California are genuinely tough. Illinois and Ohio join Pennsylvania as easy marks." page B10.

G. The Erroneous Disqualification

Petitioner notes in her petition before this Court that Justice Joseph T. Walsh docketed a disqualification, which was subsequently withdrawn. (Petition at 19-20). In fact, the disqualification was erroneously entered on the docket, and Petitioner received notice of the erroneous entry from the Clerk of the Delaware Supreme Court. (*See* Appendix at b6). Petitioner has not claimed, and the record does not reflect, any actual basis for the disqualification of Justice Walsh.

REASONS FOR DENYING THE WRIT

Assuming *arguendo* that Petitioner has properly invoked this Court's jurisdiction, the petition should be denied because, contrary to the assertions made by Petitioner, the actions of the Board and the orders below clearly do not violate Petitioner's constitutional rights, do not conflict with any decision of this Court, and do not conflict with the decisions of other state supreme courts or federal appeals courts.

I. THE ORDER OF THE DELAWARE SUPREME COURT DID NOT DENY PETITIONER'S FUNDAMENTAL PROPERTY OR LIBERTY RIGHTS AND WAS NOT IN CONFLICT WITH DECISIONS OF THIS COURT OR FEDERAL APPEALS COURTS OR OTHER STATE SUPREME COURTS

In analyzing Petitioner's claims of violations of the due process clause of the Fifth and Fourteenth Amendments, this Court will apply a rational basis review

unless the Petitioner can establish that the State action has impinged upon a fundamental right or has disadvantaged a suspect class. *Lupert v. California State Bar*, 761 F.2d 1325, 1327-28 (9th Cir.), *appeal dismissed and cert. denied*, 474 U.S. 916 (1985). Petitioner does not, and cannot, assert that bar applicants constitute a suspect class. *See Giannini v. Real*, 911 F.2d 354, 358 (9th Cir.), *cert. denied*, 498 U.S. 1012 (1990). Rather, Petitioner claims that she has a fundamental property and liberty right to obtain an attorney license which is protected by the due process clause of the Fifth and Fourteenth Amendments. (Petition at 13). This Court, however, has never held that the right to pursue a particular occupation is a fundamental right. *See Jones v. Board of Comm'rs of Ala. State Bar*, 737 F.2d 996, 1000 (11th Cir. 1984). To the contrary, "[t]here is no fundamental right to practice law or to take the bar examination." *Giannini*, 911 F.2d at 358.

The "[o]verwhelming legal authority supports this view that review of state procedures for bar admissions and testing is guided by the rational basis standard." *Id.* In *Schware v. Board of Bar Examiners of New Mexico*, 353 U.S. 232 (1957), this Court held:

> A State can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar, but any qualification must have a *rational connection with the applicant's fitness or capacity to practice law.*

353 U.S. at 239 (citations omitted) (emphasis supplied).

In analyzing challenges to state procedures governing admission and testing for the bar, federal appeals courts consistently have applied a rational basis review to

those claims which assert due process violations. *See, e.g., Fields v. Kelly*, 986 F.2d 225 (8th Cir. 1993); *Jones v. Board of Comm'rs of Ala. State Bar*, 737 F.2d 996 (11th Cir. 1984); *Younger v. Colorado State Bd. of Law Examiners*, 625 F.2d 372 (10th Cir. 1980); *Poats v. Givan*, 651 F.2d 495 (7th Cir. 1981); *Attwell v. Nichols*, 608 F.2d 228 (5th Cir. 1979), *cert. denied sub nom. Attwell v. Undercofler*, 446 U.S. 955 (1980). State supreme courts similarly have applied a rational basis review. *See, e.g., McGinn v. State Bar Bd.*, 399 N.W.2d 864 (N.D. 1987); *In re Reardon*, 378 A.2d 614, 618 (Del. 1977); *In re Pacheco*, 514 P.2d 1297 (N.M. 1973).

The cases cited by Petitioner (Petition at 15) do not change this analysis. For example, *Baird v. State Bar of Arizona*, 401 U.S. 1, 8 (1971) does not even address a claim of due process violations or whether the right to practice law is a fundamental right. Rather, this Court found that Arizona had violated the First Amendment by refusing to process an application for admission to the Arizona bar based solely upon the applicant's refusal to answer a question as to whether she had been a member of the Communist party. *Id.* at 4-5. Notably, the *Baird* Court recognized Arizona's "legitimate interest in determining whether petitioner has the qualities of character and the professional competence requisite to the practice of law." *Id.* at 7. However, the record was "wholly barren" of any evidence that the applicant was not morally or professionally fit to practice law. *Id.* at 8.

Similarly, the Fourth Circuit case cited by Petitioner, *Richardson v. McFadden*, 540 F.2d 744, 752 (4th Cir. 1976), *cert. denied*, 435 U.S. 968 (1978), does not recognize a fundamental right to practice law. Rather, the Court

found that the South Carolina bar examiners acted arbitrarily and capriciously in failing the appellants despite their passing scores on the bar examination. *Id.* at 750 (citing *Schware*, 353 U.S. at 238-39). Because they had rightfully passed the bar examination, appellants were not required to retake the examination. *Id.* at 752. Neither this case, nor the other cases cited by Petitioner, requires a board of bar examiners to admit an applicant who has not passed the bar examination.

Moreover, in *In re Peterson*, 459 P.2d 703, 710 (Alaska 1969), (cited in Petition at 15), the court, in referring to the applicant's "ultimate right" to pursue the occupation of an attorney, quoted this Court's statement in *Schware* that it need not determine whether the practice of law is a "right" or a "privilege" because, either way, a State can only prevent a person from the practice of law for valid reasons. *Id.* at 710 (quoting *Schware*, 353 U.S. at 239 n.5). As noted above, the *Schware* Court held that a state need articulate only a rational connection between its requirements for admission to the bar and the applicant's ability to practice law.

Thus, the determination of the Board to deny Petitioner's request for admission to practice law in Delaware will be upheld if it was based upon procedures and grading standards which have a "rational connection" to Petitioner's fitness or capacity to practice law. *See Schware*, 353 U.S. at 239. The Delaware procedures and grading standards meet this standard. Further, the order of the Delaware Supreme Court does not conflict with any decision of this Court, any federal appeals court or other state supreme court.

II. THE GRADING STANDARDS AND REVIEW PROCEDURES OF THE DELAWARE BAR EXAMINATION DID NOT VIOLATE PETITIONER'S RIGHT TO DUE PROCESS AND THE ORDER OF THE DELAWARE SUPREME COURT UPHOLDING THE BOARD'S DETERMINATION DENYING PETITIONER'S REQUEST FOR RECONSIDERATION DID NOT CONFLICT WITH ANY DECISIONS OF THIS COURT OR OF OTHER STATE SUPREME COURTS OR FEDERAL APPEALS COURTS

It is well settled that bar examinations are a valid determinant of an applicant's fitness or capacity to practice law. *Poats v. Givan*, 651 F.2d 495 (7th Cir. 1981); *Whitfield v. Illinois Bd. of Law Examiners*, 504 F.2d 474, 476-77 (7th Cir. 1974). Moreover, the determination of which individuals have the requisite knowledge and skill to practice law is a matter which is properly committed to a board of bar examiners. *Poats*, 651 F.2d at 497. As such, federal appeals courts will not interfere with a determination, made by a board of bar examiners, as to which individuals have the requisite skill and knowledge to practice law unless there is proof that the determination was based upon a constitutionally impermissible reason. *Feldman v. State Bd. of Law Examiners*, 438 F.2d 699, 705 (8th Cir. 1971); *Whitfield*, 504 F.2d at 477.

Of course, the safeguards of the due process clause are available to a failing bar applicant. *Tyler v. Vickery*, 517 F.2d 1089 (5th Cir. 1975) (citing *Schware*, 353 U.S. at 238-39), *cert. denied*, 426 U.S. 940 (1976). However, in order to establish a due process violation, Petitioner must prove that the Board's decision to deny her the right to

practice law was based upon fraud, coercion, arbitrariness or manifest unfairness. *Hooban v. Board of Governors of Wash. State Bar Ass'n*, 539 P.2d 686, 688 (Wash. 1975) (citing *Schware*, 353 U.S. 232 (1957) (Frankfurter, J., concurring)), *appeal dismissed*, 424 U.S. 902 (1976). Petitioner alleges that the Board impermissibly denied her admission to the Delaware bar based upon arbitrary grading standards and unfair review procedures. Petitioner's claim, however, is without merit and has been consistently rejected by other state supreme courts and federal appeals courts.

A. DELAWARE'S GRADING STANDARDS ARE NOT ARBITRARY

Essay questions on a bar examination are constitutionally permissible, as they bear a rational connection with the ability of an applicant to practice law. *See, e.g., Chaney v. State Bar of Cal.*, 386 F.2d 962, 964 (9th Cir. 1967), *cert. denied*, 390 U.S. 1011 (1968) *and cert. denied sub nom. Chandler v. United States*, 440 U.S. 927 (1979); *Feldman v. State Bd. of Law Examiners*, 438 F.2d 699, 705 (8th Cir. 1971); *Whitfield v. Illinois Bd. of Law Examiners*, 504 F.2d 474, 477 (7th Cir. 1974). Petitioner challenges Delaware's use of essay questions and claims that the Board "is vested with unfettered discretion in grading the exams" and that the graders are not required to adhere to or consistently apply a "grading formula." (Petition at 13). Petitioner's complaint, however, goes to the very nature of essay examinations, which have consistently been upheld by both federal appeals courts and other state supreme courts. For example, in *Tofano v. Supreme Court of*

Nevada, 718 F.2d 313 (9th Cir. 1983), the Ninth Circuit held:

> [S]tates may constitutionally use essay-type questions on bar examinations even though grading is necessarily subjective because performance on essay-type questions bears a rational connection with the ability to practice law. *Chaney* 386 F.2d at 964. The Fifth Circuit, in *Tyler v. Vickery*, . . . has noted that a failure to use model answers or predetermined standards in grading essay examinations does not raise an issue of fact as to whether or not the essay examination itself is a rational, and therefore constitutional exercise of State power. We agree.

718 F.2d at 315. *See also Lucero v. Ogden*, 718 F.2d 355, 359 (10th Cir. 1983) ("[t]he fact that a bar examination depends in large measure on subjective grading judgments of examiners does not, *per se*, constitute an irrationally administered examination."), *cert. denied*, 465 U.S. 1035 (1984); *Chaney*, 386 F.2d at 964 (same).

Similarly, state supreme courts have consistently upheld the validity of essay questions in bar examinations, recognizing that such questions necessarily carry some degree of subjectivity in their grading. *See, e.g., Hooban v. Board of Governors of Wash. State Bar Ass'n*, 539 P.2d 686, 689 (1975), *appeal dismissed*, 424 U.S. 902 (1976). Further, the Supreme Court of North Dakota, in *Dinger v. State Bar Board*, 312 N.W.2d 15, 17-18 (N.D. 1981), addressed a claim that essay examinations were arbitrary and capricious, constituting a denial of due process and equal protection under the Fifth and Fourteenth Amendments. Rejecting that claim, the court held that "[o]rdinary reasoning and logic tells us that a certain amount of

subjectivity is concomitant with any essay-type examination. However, such tests are not invalid *per se*." *Id.* at 17 (emphasis supplied).

A mere allegation that an essay-type examination requires subjective evaluations and that the standards of grading are not susceptible to precise definition is insufficient to state a claim for federal relief. *Whitfield*, 504 F.2d at 477.

Petitioner has not shown that her Bar Examination was graded in an arbitrary or unreasonable manner. Rather, Petitioner argues that the Board graded her Bar Examination in a "wholly arbitrary" manner because it did not use a grading formula. Petitioner's Bar Examination, however, was carefully and meticulously graded in accordance with the standards set forth by the National Conference of Bar Examiners.

B. DELAWARE'S GRADING STANDARDS AND REVIEW PROCEDURES ARE EXEMPLARY

Unlike most states, Delaware is able to comply with the preferred grading procedures of the National Conference of Bar Examiners. Due in part to the relatively small number of examinees taking the Bar Examination each year, Delaware employs a grading system whereby the same member of the Board who writes each essay question grades all answers given by bar examinees to that particular question. *See* Code of Recommended Standards for Bar Examiners, Standard 24, *The Bar Examiners' Handbook* § 5, at 75:1001 (Stuart Duhl ed., 3d ed. 1991). ("If practical, all answers to a particular essay question should be graded by the same person."). This method

reduces the possibility of any grading inconsistencies. Moreover, all Bar Examinations are graded on an anonymous basis so that the identity of the applicant is not known to the graders. *See* BR-52.6.

Delaware's review procedures are likewise designed to protect the rights of all applicants. Despite Petitioner's complaint that she has not received an adequate review of her Bar Examination, her essay responses have actually been reviewed three separate times. *In re Petition of Sharon Ann Ziegler To Del. Bar*, No. 438, 1993, order at 1 (Del. Jan. 3, 1994) (ORDER) (Appendix at a1). First, each of Petitioner's essays were graded by the Board member responsible for writing and grading that essay. Then, before the final grades were announced, the Bar Examinations of all applicants, such as Petitioner, who narrowly failed to receive a passing score were regraded. Petitioner's average score on the essay portion of the Bar Examination was 62.5% after the twelve essays were first graded, and upon regrading, Petitioner's average score was increased to 63.75%, which was still insufficient to pass the Bar Examination. Petitioner was therefore notified that she failed the Bar Examination.

Upon such notification, Petitioner requested and received a copy of the Bar Examination questions, along with her essay answers and two representative answers for each essay question. Petitioner correctly states that these representative answers are among the better answers and received scores upwards of 80-85%. After reviewing this information, Petitioner filed a petition for reconsideration with the Board describing at length why her answers were entitled to a higher score in light of the passing answers with which Petitioner was provided.

The Board considered Petitioner's arguments, again revised her grade to 64.17% but denied the petition because Petitioner had failed to receive the 65% average required to pass the Bar Examination. Petitioner then exercised her right pursuant to Delaware Supreme Court Rule 52(f) to appeal the Board's denial of reconsideration to the Delaware Supreme Court. Petitioner was able to submit argument in favor of her petition to the Delaware Supreme Court in both her notice of appeal and her reply papers. Moreover, the Petitioner's answers to the essay examinations were included in her appendix before the Delaware Supreme Court. With this information, together with the response of the Board, before it, the court denied Petitioner's request for reconsideration because Petitioner was unable to show fraud, coercion, arbitrariness or manifest unfairness. Moreover, the court determined that Petitioner's substantial rights had not been affected by the Board's action in light of the fact that she had not been denied the right to sit for the Bar Examination for a third time. (Appendix at a2).

In *McGinn v. State Bar Board*, 399 N.W.2d 864 (N.D. 1987), the North Dakota Supreme Court upheld a method of grading similar to that used in Delaware. The court noted that despite the appellant's claim that the examination was graded in an arbitrary and unreasonable manner, the appellant's answers to the examination were graded multiple times. The court held that "[i]t is a difficult burden to show that so many competent persons who reviewed [the appellant's answers], and were in close agreement as to the quality of those answers, were each arbitrary and unreasonable in their analysis." *Id.* at 867. The court found that the appellant had not met this

burden and it was not the function of the court to regrade the appellant's answers to the bar examination. *Id.*

Similarly, it is not the function of this Court to regrade Petitioner's Bar Examination, particularly in light of the review procedure provided to Petitioner by the State of Delaware. Thus, Petitioner has not shown that the Delaware Supreme Court's Order upholding the Board's denial of the petition for reconsideration was arbitrary or capricious, denied due process or conflicted with any decision of this Court, federal appeals courts or other state supreme courts. Petitioner, therefore, has shown no basis for granting the writ of certiorari.

III. THE DELAWARE SUPREME COURT ORDER REFUSING PETITIONER'S REQUEST FOR DISCOVERY OF THE GRADING FORMULA, GRADERS' NOTES AND OTHER APPLICANTS' EXAMINATIONS AND SCORES DID NOT DENY PETITIONER THE RIGHT TO PROCEDURAL DUE PROCESS OR CONFLICT WITH DECISIONS OF FEDERAL APPEALS COURTS OR STATE SUPREME COURTS

Upon receipt of Petitioner's request for information with respect to her Bar Examination the Board provided to Petitioner, pursuant to Board of Bar Examiners Rule 52.6(c), a copy of the questions from the 1993 Bar Examination, a copy of her responses to those questions and a copy of two representative answers to each essay question. Petitioner, however, was not satisfied with this information and requested that the Board divulge further

information in the form of some purported "grading formula", graders' notes and other applicants' Bar Examinations and scores. Petitioner claims that the Board's failure to provide her with this further information constituted a "denial of procedural due process because Petitioner was denied the right to any kind of review." (Petition at 16). She further claims that the order of the Delaware Supreme Court denying the requested discovery conflicts with Fifth Circuit and other state supreme court decisions. (*Id.*). Petitioner's claim is not tenable.

A. THE BOARD PROVIDED PETITIONER WITH SUFFICIENT INFORMATION TO SATISFY THE REQUIREMENTS OF PROCEDURAL DUE PROCESS

The decisions of state supreme courts and federal appeals courts require that a state board of bar examiners provide some adequate means of exposing grading errors. *See, e.g., Whitfield v. Illinois Bd. of Law Examiners,* 504 F.2d 474, 478 (7th Cir. 1974). Courts have recognized two primary methods of exposing such errors: (1) Disclosure of the failing applicant's examination answers and model or successful answers and the opportunity to be heard; or (2) Providing the failing applicant with an opportunity to retake the examination. *See Tyler v. Vickery,* 517 F.2d 1089 (5th Cir. 1975), *cert. denied,* 426 U.S. 940 (1976).

In the case at bar, Petitioner has been provided with both procedural safeguards. Petitioner has been provided with adequate information from which to expose grading errors and an opportunity to be heard. Delaware law also

allows Petitioner the opportunity to reapply for the Bar Examination a third time, and if still unsuccessful, Petitioner may seek permission from the Board to sit for the Bar Examination a fourth time. *See* BR-52.8(e). Thus, Petitioner cannot be heard to complain of a denial of procedural due process.

First, the information which the Board provided to Petitioner has been found to satisfy the requirements of due process. In *In re Pacheco*, 514 P.2d 1297 (N.M. 1973), the court held that an unsuccessful candidate for the bar is entitled to a reasonable review of the examination questions, his answers to such questions, and a sampling of a passing answer for each question. *Id.* at 1300. The applicant, however, further requested that the board furnish him with copies of sample passing and failing answers as well as model answers for each question for the bar examination. The court declined to order the board to grant these additional requests and found that such request was not reasonable. *Id.*

In *Loeb v. New York State Board of Law Examiners*, 534 N.Y.S.2d 559 (N.Y. App. Div. 1988), the petitioner challenged as a denial of due process the board's failure to provide her with written comments or other substantiation of its decision not to revise the grade on her essay answers. The court rejected this challenge, finding that the board was entitled to discretion in deference to its area of expertise and that there is a strong presumption that the powers conferred upon an administrative agency are exercised properly. *Id.* at 560. Further, the court found that the opportunity for petitioner to review her examination answers and to compare those answers with model answers, when combined with her right of reexamination,

"amply complied with the requirements of due process and was otherwise fair and reasonable." *Id.* Thus, petitioner was denied the further discovery. *See also Fields v. Kelly*, 986 F.2d 225 (8th Cir. 1993) (disclosure of essay examination, applicant's answers and model answers was sufficient; applicant was not entitled to discovery of questions or answers to multistate examination).

The cases relied upon by Petitioner do not conflict with the Delaware Supreme Court decision and do not compel a different result. *Parrish v. Board of Commissioners of Alabama State Bar*, 533 F.2d 942 (5th Cir. 1976) (cited in Petition at 17) involved a claim of racial discrimination by the board. The appellants claimed that, in order to prove such discrimination, they had to review examination papers to determine whether the examiners graded the responses of white applicants differently than those of black applicants, particularly in light of the fact that all applicants were required to file photographs with the board, thus making it possible for board members to identify applicants by race. *Id.* at 947. In this context, the court held that, pursuant to Federal Rules of Civil Procedure 56(f), discovery should have been completed before the district court ruled on summary judgment. *Id.* at 948. Of course, the case at bar does not involve allegations of racial discrimination or any other kind of discrimination, and procedurally Petitioner cannot rely upon Rule 56(f) to compel discovery because there is no motion for summary judgment pending.

In *In re Peterson*, 459 P.2d 703, 709 (Alaska 1969) (cited in Petition at 17), the court held that procedural due process requires an applicant to be furnished with the examination questions, his answers, and model answers.

The court further held that the applicant was entitled to a representative sampling of passing and failing answers due to the "peculiar factual circumstances presented" by this case, which involved a change of the minimum passing score resulting from the "flexible passing score system" whereby the board determines the passing score after the examination is graded. *Id.* at 709-710 n.20. However, the court did not hold that this information must be disclosed in situations other than the limited set of facts presented.

Petitioners reliance on *Hooban v. Board of Governors of Washington State Bar Association*, 539 P.2d 686, 688 n.1 (Wash. 1975), *appeal dismissed*, 424 U.S. 902 (1976) (cited in Petition at 17) is simply misplaced. There, the court specifically held that it was not ruling upon the discovery issue, as the parties had failed to present it.

Thus, the Board here has complied with procedural due process by supplying Petitioner with that information which courts have consistently upheld as satisfying procedural due process and the Delaware Supreme Court properly approved this decision.

B. DELAWARE LAW PROVIDING PETITIONER WITH THE OPPORTUNITY TO RETAKE THE BAR EXAMINATION SATISFIES THE REQUIREMENTS OF PROCEDURAL DUE PROCESS

Even if Petitioner had not been provided with sufficient information, numerous decisions of both state supreme courts and federal appeals courts have held that a board of bar examiners can refuse to provide a hearing

or divulge any information to a failing applicant if that applicant is provided with an opportunity to retake the bar examination. For example, in *Whitfield v. Illinois Board of Law Examiners*, 504 F.2d 474 (7th Cir. 1974), the court held that a failing applicant was not entitled to discovery of his examination papers, model answers or sample passing answers when that applicant had the right to retake the examination. The right to reexamination satisfies the purpose of a hearing and review of examination papers by exposing grading errors and thus affords the same protection to the applicant. *Id.* at 478.

> The safeguards of the due process clause are of course available to a failing bar applicant. . . .
>
> While the opportunity to be heard is generally considered a fundamental component of due process, entitlement to a hearing does not automatically flow from a finding that procedural due process is applicable.

Tyler v. Vickery, 517 F.2d 1089, 1103 (5th Cir. 1975), *cert. denied*, 426 U.S. 940 (1976). *See also Fields v. Kelly*, 986 F.2d 225 (8th Cir. 1993); *Lucero v. Ogden*, 718 F.2d 355 (10th Cir. 1983), *cert. denied*, 465 U.S. 1035 (1984); *Brewer v. Wegmann*, 691 F.2d 216, 217 (5th Cir. 1982) ("Post-examination access to the bar examination papers, and opportunity to secure review of the fairness of the grade, have thus been held by decisions of this circuit not to be process that is due to unsuccessful applicants."), *cert. denied*, 461 U.S. 908 (1983).

The fact that Delaware does not provide an unlimited right to reexamination, but rather provides an applicant with the opportunity to take the Bar Examination three, and in some cases four, times does not change the result.

See BR-52.8. In *Jones v. Board of Commissioners of Alabama State Bar*, 737 F.2d 996, 1001 (11th Cir. 1984), the court held that the Alabama rule limiting to five the number of times an applicant can sit for the Alabama Bar Examination does not violate the due process clause. Reexamination was nonetheless considered a highly effective method of insuring that mechanical error or arbitrary conduct was not responsible for a failing examination in light of the strong likelihood that grading error would not occur five times. *See also Poats v. Givan*, 651 F.2d 495 (7th Cir. 1981) (Indiana Supreme Court rule limiting to four the number of bar examinations an applicant may take satisfies due process); *Younger v. Colorado State Bd. of Law Examiners*, 625 F.2d 372 (10th Cir. 1980).

As the Board has provided Petitioner with access to a hearing, representative answers and also an opportunity to retake the Bar Examination, it has more than complied with the mandates of procedural due process. Thus, Petitioner does not have the right to seek further discovery and both the Board and the Delaware Supreme Court correctly so held.

IV. PETITIONER'S SUBSTANTIAL RIGHTS HAVE NOT BEEN AFFECTED

The Board's denial of Petitioner's request for reconsideration did not affect Petitioner's substantial rights because Petitioner may reapply to sit for the Bar Examination for a third time. As set forth above (*see* supra pp. 24-26) courts have consistently held that the opportunity to retake the bar examination satisfies procedural due process. *See, e.g., Jones v. Board of Comm'rs of Ala. State Bar,*

737 F.2d 996, 1001-02 (11th Cir. 1984). Because Delaware law provides Petitioner with this opportunity, she has not established that her substantial rights have been affected, or that she has been denied procedural due process.

V. THE JUDGMENT BELOW WAS NOT CLEARLY ERRONEOUS

Petitioner asserts that the Delaware Supreme Court erred by: (1) allowing Justice Walsh to participate in her case notwithstanding his alleged "disqualification"; (2) granting motions for reconsideration of some applicants and not for others; (3) relying upon an "erroneous" set of facts; (4) remanding Petitioner's case to the Board for a character investigation; and (5) failing to investigate the Board's alleged misrepresentation of Delaware bar admission rates to the National Conference of Bar Examiners. (Petition at 19-22). Despite Petitioner's bold allegations, it is clear that the Delaware Supreme Court properly determined to deny Petitioner's request for reconsideration.

A. THE ISSUE OF THE DISQUALIFICATION OF JUSTICE WALSH WAS NOT ERROR

Petitioner claims that the Delaware Supreme Court "committed plain error" when Justice Joseph T. Walsh participated in the consideration of her petition notwithstanding a December 7, 1993 entry on the docket of Petitioner's case noting Justice Walsh's purported disqualification in the matter. (Petition at 19). However, Petitioner cites no valid reason why Justice Walsh should

have been disqualified from considering her petition, and in fact, no valid reason for such disqualification exists.

Rather, the December 7, 1993 docket entry noting Justice Walsh's purported disqualification was merely an error, and Petitioner was notified of this fact upon discovery of the error on January 31, 1994. (Appendix at b6-7). Thus, as there was no reason for the disqualification, it cannot possibly support a decision reversing the Delaware Supreme Court's Order denying Petitioner's request, particularly in light of the fact that the Delaware Supreme Court's Order was unanimous. The cases cited by Petitioner are inapposite. *See Moody v. Simmons*, 858 F.2d 137 (3d Cir. 1988) (judge acted inappropriately by continuing to sit on case despite appearance of partiality resulting from his daughter's employment by interested party to the litigation), *cert. denied*, 489 U.S. 1078 (1989); *Arnold v. Eastern Air Lines, Inc.*, 712 F.2d 899 (4th Cir. 1983) (in determining whether case had achieved *en banc* status, court did not count judge who validly recused himself), *cert. denied*, 464 U.S. 1040 (1984).

B. THE DELAWARE SUPREME COURT PROPERLY DETERMINED TO UPHOLD THE BOARD'S DENIAL OF PETITIONER'S REQUEST FOR RECONSIDERATION

The remainder of Petitioner's arguments are equally untenable. First, the Delaware Supreme Court, in the exercise of its discretion, may determine to grant some motions for reconsideration and deny others. The Petitioner's motion was based on Delaware Supreme Court Rule 52(f) which provides:

> The Court may summarily refuse a petition which does not affect the substantial rights of the person claimed to be aggrieved.

In this case, after reviewing the submissions of Petitioner and that of the Board, the Delaware Supreme Court determined that Petitioner's substantial rights were not aggrieved. As set forth above (*see* supra pp. 24-26), Delaware law provides Petitioner with the opportunity to retake the Bar Examination, thus, the court's determination that her substantial rights have not been impaired is established. *See, e.g., Whitfield v. Illinois Bd. of Law Examiners*, 504 F.2d 474, 478 (7th Cir. 1974). The fact that the court may determine that other failing applicants have had their substantial rights aggrieved does not affect the court's valid determination with respect to Petitioner.

Second, Petitioner alleges that the Delaware Supreme Court erred because it relied on an erroneous set of facts with respect to Petitioner's covert taping of an interview with a member of the Board. Despite Petitioner's statement to the contrary, this issue is irrelevant. Whether Petitioner's surreptitious taping was in person or over the telephone has absolutely nothing to do with Petitioner's Bar Examination or the Board's grading or review of that Bar Examination. It relates, if at all, only to any subsequent character assessment of Petitioner should she determine to apply to retake the Bar Examination. Accordingly, the taping issue is not properly before this Court and is utterly irrelevant to this Court's determination of whether to grant the writ.

Third, except as it relates to this Court's jurisdiction, the Delaware Supreme Court's remand of the case to the Board for a character investigation of Petitioner is also

irrelevant to the issue of the Petitioner's Bar Examination and the Board's determination with respect to that examination. The Board's grading of Petitioner's Bar Examination was anonymous. Thus, there is no possibility of prejudice against Petitioner that may result. *See* BR-52.6.

Finally, the Delaware Supreme Court did not err in failing to investigate any alleged misrepresentation of Delaware bar admission rates to the National Conference of Bar Examiners. The record is unclear as to what statistical error, if any, was made. Further, this issue is irrelevant to any claims that Petitioner is making in this Court, as it was irrelevant to the claims Petitioner made in the Delaware Supreme Court. The limited issue here is the Petitioner's score for the 1993 Bar Examination and the Board's determination with respect to that Bar Examination. Thus, the Delaware Supreme Court did not err in failing to investigate this collateral matter.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

E. N. CARPENTER, II
Counsel of Record

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ALLISON L. AMORISON

RICHARDS, LAYTON & FINGER
One Rodney Square
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(302) 658-6541
Counsel for Respondents Board of Bar Examiners of the State of Delaware and the Members Thereof

APPENDIX

IN THE SUPREME COURT OF
THE STATE OF DELAWARE

In Re: Application of Sharon Ann Ziegler to the Delaware Bar	)))	1993 Bar Examination

RESPONSE OF BOARD OF BAR EXAMINERS
OF THE STATE OF DELAWARE
TO NOTICE OF APPEAL
AND MOTION FOR DISCOVERY OF
SHARON ANN ZIEGLER

(Filed Dec. 15, 1993)

The Board of Bar Examiners of the State of Delaware (the "Board") responds to the Notice of Appeal (the "Notice") of Sharon Ann Ziegler ("Petitioner" or "Ms. Ziegler") based on the following facts and law:

Background

1. Petitioner sat as an applicant to the Bar of the State of Delaware at the Board's administration of the 1993 Delaware Bar Examination. This is the second time petitioner has taken the Delaware Bar Examination. The Bar Examination consisted of the Multistate Bar Examination ("MBE") administered by the National Conference of Bar Examiners and 12 essay questions as prescribed by Board Rule ("BR") 52.4.

2. After its administration, the Secretary of the Board distributed the applicants' answers to the Board members who had primary responsibility for drafting the essay questions. After assigning a grade to each answer,

each Board member submitted the results to the Secretary. Exhibit A shows that on September 24, 1993 Petitioner, Applicant No. 42, had achieved an average of 62.5 on the 12 essay questions. Each Board member then reviewed the answers of Applicant No. 42 again, and as a result of adjustments made in single point increments pursuant to the review, Applicant No. 42 achieved an average of 63.75 (*See* Exhibit B). Based on these results, the Board determined on October 7, 1993 that Applicant No. 42 failed the Bar Examination. The Board notified the applicant by certified mail of the results of the examination.

3. Subsequently, Applicant No. 42 petitioned the Board for a review of five of her twelve answers. (*See* Exhibit C). Each member who had primary responsibility for drafting those essay questions once again reviewed the applicant's answers.

4. At its November 16, 1993 Board meeting, the Board adjusted the grades on one of the five answers of Applicant No. 42. The adjustment increased the applicant's aggregate by 5 points and raised her average from 63.75 to 64.17, which was still short of the 65.0 average required under BR-52.4(c). The Board therefore determined to deny the applicant's petition. At no time prior to the filing of her petition to the Court was the identity of Applicant No. 42 revealed to the members of the Board.

The Notice Of Appeal

5. In her "Notice of Appeal" before the Court, Ms. Ziegler fails to meet her burden of demonstrating that the Board abused its discretion in its review of her answers to

the essay questions of the Bar Examination. *See Petition of W.M.I.*, Del. Supr., 394 A.2d 207, 208 (1978). She has not shown fraud, coercion, arbitrariness or manifest unfairness by the Board in its determination concerning Ms. Ziegler's proficiency. Absent such factual allegations, Ms. Ziegler's "Notice" seeking to set aside the Board's determination should be dismissed. *See In re Reardon*, Del. Supr., 378 A.2d 614, 618 (1977). *See also Petition of DeOrsey*, R.I. Supr., 312 A.2d 720 (1973) (absent "clear unequivocal allegations of probative facts," the Court will not "embark on an investigation to ascertain the integrity of the examination results"). Further, petitioner may sit for further examination, therefore she has not shown that the Board's action affects her substantial rights. Del. Supr. Ct. Rule 52(f); *In re Petition of Nicholas N. Leach*, Del. Supr., No. 197, 1986 (June 25, 1986).

6. In addition, in her petition for regrading below (Exhibit C) the applicant stated:

> I understand that great care is taken in grading all the examinations, however, there is always the possibility of unintentional human error. This is why I request that the essay section to my 1993 Delaware Bar Examination be regraded. (Petition ¶ 4)

Petitioner's appeal is inconsistent, therefore, with her petition to the Board.

7. Petitioner also has not demonstrated any violation of the due process or equal protection clauses of the Constitution. In order to do so, petitioner would have to allege facts to show that the procedures adopted by the

Board did not have a reasonable basis or rational connection between it and a legitimate State interest. *In re Reardon, supra* at 618-619 ("The Constitution does not require a perfect test nor does it require perfect examiners; it requires only a rule of rationality.")

8. Petitioner seeks to support her appeal upon the basis of what purport to be excerpts from her conversation with Board member Michael Rich, which was taped by her without his knowledge or consent. Apart from the failure of such excerpts to support her petition, the conduct of the petitioner as a member of the Pennsylvania Bar was improper, and the excerpts from the taping should not be considered. *Jerome Kaplan v. Oscar S. Wyatt, Jr., et al.*, Del. Ch., C.A. No. 6361, Brown, C. (January 18, 1984) citing ABA Comm. on Ethics and Professional Responsibility, Formal Opinion 337 (1974). Mr. Rich's alleged statements in any event, do not support petitioner's argument as set out in paragraphs 2 and 4, *supra*.

9. Petitioner has not shown that the "multiple cutoff" scoring system is arbitrary or violates her due process or equal protection rights. The use of both the MBE and the essay tests are rationally related to the legitimate purpose of measuring professional competence. *See In re Petty*, Del. Supr., 410 A.2d 1021, 1023-24 (1980).

10. Nor has petitioner made the necessary showing for the grant of discovery she seeks, *e.g.*, a *prima facie* showing of impropriety by the Board. *In re Petty, supra* at 1024. In the absence of such a showing, an applicant is "not entitled to explore for it among the Board's administrative process." *Id.*

11. Finally, petitioner's allegations regarding violations of Professional Conduct Rule 8.4(c) and 15 U.S.C.A. §§ 1 and 2 are entirely unsupported, but in any event need not be considered as they do not affect petitioner's substantial rights. Del. Supr. Ct. Rule 52(f); *Petition of W.M.I., supra.*

12. Accordingly, under the foregoing circumstances and absent any allegation of abuse of discretion by the Board, the Motion for Discovery and Notice of Appeal should be denied and the appeal dismissed.

Respectfully submitted,

/s/ Josy Ingersoll
Josy W. Ingersoll
Secretary, Board of Bar Examiners
11th Floor, Rodney Square North
P. O. Box 391
Wilmington, Delaware 19899-0391
(302) 571-6672

Dated: December 15, 1993

SUPREME COURT OF DELAWARE

MEMORANDUM

(Filed Jan. 31, 1994)

FROM: JUSTICE WALSH

TO: Margaret L. Naylor, Esquire
Clerk of the Supreme Court

RE: Application of Sharon Ann Ziegler
No. 438, 1993

DATE: January 31, 1994

On December 7, 1993, I entered a disqualification in the above referenced matter. This notice was entered in error. Please make the appropriate entry on the docket and advise the parties to that effect.

/s/ J. Walsh

JTW:llf

xc: Chief Justice Veasey
Justice Horsey
Justice Moore
Justice Holland

IN THE SUPREME COURT OF THE
STATE OF DELAWARE

vs	)	No.
	)	438, 1993
In Re: Application of	)	
Sharon Ann Ziegler	)	
(Applicant No. 42)	)	
	)	

The following docket entry has been made in the above cause.

Jan. 31. Memo dated 1/31/94 from Justice Walsh to Clerk withdrawing his disqualification in the above referenced matter. Parties notified.

CC: Sharon Ann Ziegler
Josy W. Ingersol, Esquire
Henry N. Herndon, Jr., Esquire

/s/ pm
Clerk

Date: January 31, 1994

SUPREME COURT OF DEALWARE

MARGARET L.
NAYLOR, ESQUIRE
Clerk

CATHY L. HOWARD
Assistant Clerk

SUPREME COURT
BUILDING
55 THE GREEN
P.O. BOX 476
DOVER, DE 19903

(302) 739-4155

February 17, 1994

William J. Wade, Esquire
Chairman
Board of Bar Examiners
200 W. 9th St., Suite 300
Wilmington, DE 19801

RE: *In re Petition of Ziegler, No. 438, 1993*

Dear Mr. Wade:

At the direction of the Court, I am writing to advise the Board that Justice Walsh's disqualification was erroneously entered on the docket by the Clerk's office in the above captioned matter. Justice Walsh was not, in fact, disqualified in the matter. In addition, I am enclosing a copy of a letter which was purportedly written by Ms. Ziegler and which appeared in the January 31 – February 6 edition of the Delaware Business Review.

Very truly yours,

/s/ Margaret L. Naylor

Enclosure(s)

cc: Henry N. Herndon, Jr., Esquire
(with copy of enclosures)
Josy W. Ingersoll, Esquire
(with copy of enclosures)
Ms. Sharon Ann Ziegler
(with copy of enclosures)